Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-741

MIZOKAMI BROS. OF ARIZONA, INC., an Arizona Corporation, *Petitioner*

v.

BAYCHEM CORPORATION, a New Jersey Corporation; BAYER DE MEXICO, S.A., a corporation of the United States of Mexico; and BAYER AG., a corporation of the Federal Republic of Germany, *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITIONER'S REPLY MEMORANDUM

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January 4, 1978

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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1. *We Stand by the Factual Statements of the Petition:*

The Briefs in opposition attack statements in the Petition as unsupported by the record. However, we stand by the facts there stated. One example of the extreme nature of Respondents' assertions relates to the events which occurred in Arizona. Bayer de Mexico asserts (p. 4, 5) that the statements in the Petition (p.

7) that three vans or truck trailers loaded with Petitioner's peppers crossed the border into Nogales, Arizona, and that the FDA in Nogales, Arizona, took samples of Petitioner's peppers when they arrived in Arizona, are unsupported by the record. We attach hereto at A-1, a copy of parts of pages 779-780 of the record on appeal which alone demonstrates the error of Respondents' assertions.

As for Petitioner's checks for the purchase of Tamaron drawn on an Arizona Bank, (pet. p. 6, 7, 11), these were described in the record on appeal as "records" of "individual transactions" showing the "money spent for insecticides". It was stated that such documents would be made available to Respondents (1049, 1060).

Appendix 1a attached to Baychem's Brief, an *ex parte* document, is not a part of the record on appeal and is improper. In any event, it does not meet the standards set forth in the Petition (p. 17), paragraph "Second".

2. *Conflict with the Norwood case:* Respondents argue the facts of *Norwood* v. *Kirkpatrick* 349 U.S. 29, L. ed. 789, 75 Ct. 544 (1955). But no Respondent appears substantially to deny that, under the holding and language of that case set forth in our Petition (p. 12), a District Court does not have the power to dismiss a complaint on the ground of *forum non conveniens.* Hence, we submit that it is clear that the decision below conflicts with the *Norwood* case.

3. *The Knowledge of Respondents that Tamaron was Being Exported to the United States on Petitioner's Vegetables:*

Bayer de Mexico admits (p. 4), that in the years prior to March, 1973, vegetables grown in Mexico

which contained Tamaron furnished by Respondents were exported to the United States without incident, as a regular practice (1251, 1091-1094). Thus we submit that Respondents knew, or should have known, that this practice would extend into March, 1973.

4. *Mexican Witnesses and Mexican Law:* Inasmuch as Respondent Bayer, A.G., has economic control over the other Respondents and their distributors, there should be no problem in making such Mexican witnesses as may really be necessary, available in Arizona.

As for Mexican law, the case is not governed by Mexican law, and Respondents, including Baychem (p. 2, 15, 16, 17) considerably overstate its possible applicability to this case. Violation of Mexican law is alleged in the Complaint only as an alternative theory (Record p. 24). The main theories of the Complaint are those of product liability based on misrepresentation and breach of warranty by reason of the events which occurred in Arizona when Respondents' chemicals exploded there in a legal sense, and created the catastrophe which produced this litigation. (Pet., p. 9, 11, 13).

With regard to the Mexican statute of limitations, Respondent Baychem is in error when it asserts (p. 7) that there is in the record on appeal "an affidavit of a Mexican lawyer filed by Respondents giving the opinion that the statute had not run. (R. 163-169)." The affidavit of the Mexican lawyer there set forth does not even deal with statutes of limitation. We submit that it is clear that the Statute of Limitations has run in Mexico. (Pet. p. 10).

Petitioner did not and does not do business in Mexico.

5. *The Allegations of the Complaint Should be Taken as True:*

We submit that, as pointed out in the Petition, (p. 23), the allegations of the Complaint should be taken as true, unless seriously controverted by other, reliable evidence, specific in character. But the opposing Briefs do not suggest that the portions of the Complaint relied on in the Petition are so controverted. Moreover, on F.R.C.P. 12(b) motions, "the allegations" of the Complaint may bear on "the nexus between the claim or the parties and the forum for purposes of determining the applicability of a long arm statute". Hence the allegations of the Complaint should be accepted as true. See 5 Wright & Miller, *Federal Practice and Procedure,* ¶ 1363, p. 654; *Idem,* ¶ 1068, 1069.

6. *Respondent Baychem Made Its Bed in the United States:*

To paraphrase the statements in Respondent Baychem's Brief, (p. 17), Baychem (a) incorporated in the United States; (b) produced Tamaron in the United States; (c) sold Tamaron in the United States for delivery in Mexico knowing, or being reasonably chargeable with the knowledge that some of the Tamaron so sold would be exported to the United States on vegetables purchased by Petitioner, a United States corporation; and (d) caused its chemical, Tamaron, to reenter the United States and there to violate United States law. Thus, we submit that a fairer way to describe Baychem's situation is:

> There was more than a United States nexus here—the whole case is a United States case. Defendant Baychem made his bed in the United States; now he must lie in it.

7. *The Extreme Decision Below is Unprecedented:*

For the first time in the history of the United States, and contrary to the *Norwood* case, the Court below denied access to the Courts of the United States to an American citizen seeking damages from another American citizen. We submit that this is grossly improper; and that a dismissal on the ground of *forum non conveniens* between two United States citizens,—regardless of the nature of the claim or where it arose, even though ours arose in Arizona—is improper. In addition, Petitioner has been left without a forum, and without a remedy. His claims have been arbitrarily extinguished, without due process.

Thus, this case appears to present an unusual opportunity for this Court to set ground rules for (a) the scope of jurisdiction in product liability cases; (b) the standards of due process in diversity cases; and (c) the applicability of *forum non conveniens* where an international element is present.

Respectfully submitted,

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January 4, 1978

APPENDIX

APPENDIX A-1

Excerpts From The Record On Appeal

Pages 779-780

(From the Affidavit of R. C. Kellett,
Secretary of Petitioner, sworn to 19 June, 1974)

"On Friday, March 16, a customs broker who handles our account, William Joffroy, advised our Nogales office that samples of pepper were being taken by the FDA from PFT 110615. This is the number of a van leased to the Mexican railroad along with many others by Pacific Fruit Express, a subsidiary of the Union Pacific and Southern Pacific Railroad. Our company used these vans to transport the packed vegetables from the packing plant in Los Mochis, Sinoloa to Nogales, Arizona.

"The contents of PFT 110615 were unloaded in the Nogales, Arizona warehouse pending result of laboratory tests by the FDA. The next day, Saturday, March 17, the Nogales office advised that a hold order had been issued by the FDA on two additional shipments of bell peppers, one in PFC 16046 and one in truck license TU8310, Sinoloa, Mexico. Later in the day, at approximately 6:00 P.M. of March 17, we were advised by the Nogales office that an embargo had been placed on all pepper by United States Customs at approximately 4:30 P.M., Saturday afternoon, March 17th. We were further advised that the reason for the embargo was that residues of an insecticide known in Mexico as Tamaron or in the United States under the trade name of Monitor 4 were found on the pepper."